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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 329

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

versus

CABOT CARBON COMPANY and CABOT SHOPS, INC.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

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HAUSER PRINTING CO., INC., NEW ORLEANS

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Opinions Below

Review by certiorari is sought herein as to an unreported decree of the United States Court of Appeals for the Fifth Circuit setting aside an order of the National Labor Relations Board and denying enforcement thereof. The opinion of the Board is reported at *117 N.L.R.B. 1633.*

Jurisdiction

Petitioner invokes the jurisdiction of this Court under *28 U.S.C. 1254* and *Section 10(e)* of the *National Labor Relations Act, as amended.*

Question Presented

Whether the National Labor Relations Act prohibits discussion by an employer with a committee of his employees of problems of mutual interest, including grievances and other matters which might be the subject of Collective bargaining, where such committee was established by the employer at the instance of the Government to aid production and was maintained by the employer as a forum for discussion of mutual problems with employees, and did not engage in any aspect of collective bargaining.

Statute Involved

The relevant provisions of the National Labor Relations Act, as amended, are Sections 2(5), 8(a)(2) and 9(a), which are printed as a portion of "Appendix B" to the petition herein.

Statement

Cabot Carbon Company and Cabot Shops, Inc. (hereinafter referred to as "Cabot"), were charged before the Board with having dominated or interfered with the administration of, and with having contributed financial or other support to, certain "Employee Committees", in alleged violation of Section 8(a)2 of the National Labor Relations Act, as amended.[1] Cabot denied the charge and after hearings held in Louisiana and Texas an Intermediate Report of a Trial Examiner issued, recommending the disestablishment of the committees.[2]

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[1] 29 U.S.C. § 151, et seq. As used herein "the Act" refers to the Act of July 5, 1935, 49 Stat. 449, as amended by the Act of June 23, 1947, 61 Stat. 136, which, as so amended, is known as "Labor Management Relations Act, 1947", and is contained in 29 U.S.C. §§ 151-188. Unless otherwise noted, all emphasis is supplied.

[2] R. 89-142. References to the printed transcript of record herein are made by the letter "R", followed by the number of the page. References to the Joint Appendix will be made by designating the number of the volume, followed by the letters "J.A.", and thereafter the page number, as, for example, "2 J.A. 10".

Cabot filed exceptions to the Intermediate Report, and the Board heard the matter on briefs, adopting the Intermediate Report as the basis of its Order.[3] Cabot thereupon petitioned the United States Court of Appeals for the Fifth Circuit for review of the Order, and the Board cross-petitioned for enforcement. The Court of Appeals for the Fifth Circuit set the Order aside and denied enforcement thereof.[4]

The decision of the Court of Appeals assumes as true those facts found by the Board (wherever supported by any substantial evidence) but draws from such facts entirely different legal conclusions. The facts as found by the Trial Examiner, concurred in by the Board, and recognized by the Court of Appeals, may be briefly summarized as follows:

At the request and under the supervision of the United States Government (i.e., the War Production Board), during the World War II Cabot instituted the system of Employee Committees [5] (which the Labor Board here seeks to destroy) to promote production and eliminate production interruptions. The by-laws of the Committees, in a form approved by the Government, were adopted and have existed in substantially the same form to this date.[6] The purposes of the Committees are to bring about a better understanding between employees and management and provide a procedure for considering employees' ideas with respect to problems of mutual interest.[7] In non-union plants or departments the Committees process grievances [8] if requested by an employee.

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[3] R. 156-160.
[4] Petition, p. 34.
[5] Petition, pp. 16-19; R. 100; 1 J.A. 215-218, 256-263; 2 J.A. 897-899.
[6] *Id.*; see also 2 J.A. 940-942.
[7] Petition, pp. 17-19.
[8] Petition, pp. 18, 20.

Neither the by-laws of the Committees,[9] nor the manner in which they function,[10] purport to give the Committees any right to bargain with the employer, or to represent others for the purposes of collective bargaining. Even in the matter of grievances the decision of the management is final, and the Committees have no right to seek arbitration or other outside remedy.[11] The authority of the management remains unimpaired[12] and, except for the functions of handling grievances, flower funds, and the like (where applicable), the Committees exist solely for discussion purposes and for the purpose of transmitting information as to plant operation and employee sentiment up to top management, and top management's current thinking back to the employees.[13] These Committees are not formal organizations, do not follow collective bargaining procedures, formal or informal, have no power to bargain collectively and take no action inconsistent with the terms of any existing collective bargaining agreement[14] (a number of which exist at Cabot plants). As the Court below stated:[15]

> "Taking a second look at the by-laws and also the Trial Examiner's Report, adopted by the Board, we find—in the language of the Examiner: 'The Committees have never attempted to negotiate a contract. * * * [A]ll aspects of collective bargaining are either frustrated or absent * * * [The committees] avoid the usual concept of collective bargaining, but provide a forum for discussion of mutual problems, exchange of information, presentation and consideration of employee suggestions and recommendations, including the adjust-

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[9] Petition, pp. 17-19; R. 101-107; 1 J.A. 152-157.
[10] *Cf.* R. 120-121; 1 J.A. 263.
[11] *Cf.* R. 121; 1 J.A. 16-18.
[12] Petition, p. 18; *cf.* R. 121.
[13] *Cf.* Petition, p. 32; 1 J.A. 221; and see J.A. generally.
[14] *Cf.* R. 107, 121; Petition, p. 32; 1 J.A. 230.
[15] Petition, p. 32.

> ment of grievances [at nonunion plants] and the improvement of working conditions'. On these facts we find that the Employee Committees and the Central Committee at Cabot's plants were not 'labor organizations'."

It is of considerable importance to note that there is no evidence in this record that these Committees were intended to serve, or in fact have served, as disguised "company unions". The fact is that the Committees have existed side by side with labor unions and that, prior to the first charge filed herein, no union had ever objected to the existence of the Committees.[16] Further, there is no evidence from which any "evil intent" might be inferred with regard to Cabot; on the contrary, the record is replete with evidence of Cabot's good labor relations record, of its high wages and benefits, of its forward-looking and democratic employment policies,[17] and of its ready acceptance of the principles of collective bargaining when its employees choose unions to represent them. The Trial Examiner and the Board gave Cabot a clean bill of health except as to the question of the Committees.

Reasons for Denying the Writ

1. The Decision Below Is Plainly Correct.

2. No Question of Great Importance to The Administration of the Act is Here Presented.

3. The Petition Advances An Untenable Construction of the Act as Amended, Which, If Adopted, Would Create A Serious Constitutional Issue.

1. Section 8(a)(2) of the Act makes it an unfair labor practice for an employer to dominate or interfere

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[16] Petition, p. 20; R. 112; 2 J.A. 892-893.

[17] See Tr., generally. And see R. 133-137, 139.

with the formation or administration of a "labor organization" or to contribute support to it. Section 2(5) defines "labor organization" as "any organization of any kind, or any agency or employee representation committee or plan, in which employees participate **and which exists for the purpose,** in whole or in part, **of dealing with employers** concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work".

This language, found in the original Act, was construed by the Courts so as to equate the phrase "dealing with" to the phrase "discussing with".[18] This had the effect of outlawing virtually every employee committee formed by management, since it is too much to expect that employee committeemen would not at least "talk about" matters which are of consuming interest to them. The Congress was not satisfied with the effect which this construction gave to the Act; there is a difference between a "discussion" among parties who have no authority or power to "deal" or "bargain", and a "discussion" or "dealing" among parties who are in a position to bargain.

The original "Hartley Bill" expressly permitted (Section 8(d)(3)) the continued existence of committees, such as those here involved.[19] The Hartley Bill was passed by the house, but was amended by the Senate, and, on the refusal of the House to concur in the Amendments, went to Conference. The Conferees accepted neither the House bill nor the Senate substitute, but in fact wrote a new bill which is embodied in the Conference Report.[20] The Conference Report (Rept. No. 510, on H.R. 3020)

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[18] See, *e.g.*, *N.L.R.B. v. James H. Mathews & Co.*, 156 F. (2d) 706 (C.A. 3).

[19] H.R. 3020, 80th Cong., 1st Sess., 1 Leg. Hist. 56. And see explanation contained in House Report No. 245, 1 Leg. Hist. 324, which leaves no doubt as to the purpose of Section 8(d)(3).

[20] Petition, p. 25; and see 1 Leg. Hist. 880.

was printed as a House document and copies were placed on the desks of all Senators.[21] Mr. Hartley, from the Committee on Conference called up the Conference Report in the House and it was there agreed to.[22] After considerable debate, the Senate also agreed to the Conference Report.[23] Thus, the Conference Report is the primary source of knowledge as to legislative intent and must, of necessity, take precedence over debates in either chamber.

The Conference Report explains its omission of the express provision concerning employee committees, as follows:[24]

> "Section 8(d)(3) of the Amended Labor Act in the House bill provided that nothing in the Act was to be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with it matters of mutual interest, if the employees did not have a bargaining representative. This provision is omitted from the conference agreement since the act by its terms permits individual employees and groups of employees to meet with the employer and Section 9(a) of the conference agreement permits employers to answer their grievances."

The explanation given by the Report can have but one meaning: First, the original Act "by its terms" (in the proviso to Section 8(a)(2)) permitted an employer to confer with his employees without loss of time or pay and (in Section 9(a)) gave an individual or "group of employees" the right to present grievances to the employer. Second, the amendment to Section 9(a) by the conference agreement permits employers to adjust the

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[21] 2 Leg. Hist. 1526.
[22] 1 Leg. Hist. 899-900.
[23] 2 Leg. Hist. 1620-1.
[24] Rept. No. 510, on H.R. 3020, 1 Leg. Hist. 505, 549.

complaints or grievances raised by the employees (or committee of employees), with whom he confers. Therefore, says the conference Report, the express provision in the Hartley Bill is not necessary; its stated object (permitting these "dominated" committees to exist for discussion purposes and the handling of grievances) is accomplished by the combination of the existing Sections 8(a)(2) and 9(a), plus the amendment to 9(a).

The Court below found that the Conference Report did not reject on principle the express provision of the Hartley Bill; that, on the contrary, "it was considered as implicit in the terms of the act * * * ".[25] This is the only logical conclusion that can be drawn from the language of the Conference Report, when viewed in the light of the legislative history.

Petitioner suggests that the language merely explains that it was unnecessary to permit employers to form employee committees to discuss grievances, etc., since the employees had the right to present such grievances individually and in groups.[26] This contention boils down to an assertion that an employer could confer with an employee or a "group of employees", but not with a "committee of employees" concerning grievances, etc., presumably because the committee might act in a representative capacity. Petitioner's argument overlooks the context of the language in question. That portion of "the act" which the Report says "permits individual employees and groups of employees to meet with the employer" is Section 8(a)(2) which provides, in part, that "an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay". This provision is dealt with in the Con-

[25] Petition, p. 28.
[26] Petition, p. 13.

ference Report immediately prior to the above quoted paragraph and is stated to be applicable "not only to individual employees but also to employees acting in a representative capacity in conferring with the employer".[27] When the very next paragraph of the Report apologizes for the omission of references to employee committees, the explanation must refer to "individual employees and groups of employees" including those "acting in a representative capacity in conferring with the employer". Thus, the "groups of employees" necessarily include, among others, employee committees.

Congress had no intention of permitting "company unions" to exist.[28] The Court below was mindful of this intent.[29] But Congress, as the Court below recognized, did intend to correct the course of judicial decision to differentiate between a "Company union", by whatever named disguised, and an employee committee without power or right to bargain collectively.[30] And the ground of differentiation was the same as the Court below found—the "discussion" of matters between an employer and a committee of his employees which does not involve any aspect of collective bargaining is far different from collective bargaining, and, hence, does not lead to the evils of "company unions" which, by definition, deal with employers.

It is respectfully submitted that under the clear history of the amendment to the statute the decision below is plainly right.

2. Contrary to the assertion in the petition, the de-

[27] 1 Leg. Hist. 549.

[28] See, *e.g.*, 1 Leg. Hist. 324. This is obviously what Senators Taft and Ball were seeking to convey in the remarks seized upon by petitioner. See Petition, pp. 12-13.

[29] Petition, p. 32.

[30] Petition, pp. 29-30, 32-33.

cision below, though based on a new legal approach to the problem, does not sanction "committees" which are disguised "company unions" and is not of real importance to the administration of the Act. Plans which do interfere with the existence of the right to bargain collectively through representatives of the employees' own choosing are not within the holding below.[31] The Court below found that the Act, as amended, contemplated the existence of committees of employees maintained by employers for discussion purposes, but not invested with bargaining powers and not utilized as disguised bargaining agents.[32] Although the factual context here clearly meets these tests, it is highly unlikely that similar factual situations would or could recur in any number. Here, the following facts are found:

> (a) The committees were not instituted to combat unionization or to serve as disguised bargaining agents; they were instituted at Government request, to serve functions specified by the Government and to operate with Government approved by-laws.[33]
>
> (b) The committee members and the management representatives recognize that neither has any right or authority to bargain, and, as the Trial Examiner, the Board, and the Court of Appeals found, all aspects of collective bargaining are absent.[34]
>
> (c) In various plants, the committees have for years existed side by side with bona fide trade unions.[35]
>
> (d) The committees have no formal organization similar to a trade union and, in fact, do

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[31] *Id.*
[32] *Id.*
[33] *Cf.* Petition, p. 17; R. 100-101; 133-137, 139. See also references notes 5 and 6, above.
[34] *Cf.* Petition, p. 32; R. 121.
[35] *Cf.* Petition, p. 20; R. 112.

not conduct themselves like a trade union.[36]

(e) No anti-union animus can be attributed to Cabot.[37]

Counsel for Cabot have not located any reported case in which each of the above five factors was present; the probability of the recurrence of the same circumstances in the future would, therefore, appear small.

3: The petition urges an untenable explanation of the legislative history which, if adopted, would create serious constitutional problems not yet decided by this Court. The petition urges[38] that the meaning of the quoted language from the Conference Report is that Congress expressly rejected the provision of the Hartley Bill and intended to allow conferences between the employer and groups of employees, but not with employee committees. One need only insert this result in the language of the report to show how tenuous is the argument, thus:

AS THE REPORT READS:	AS THE BOARD WOULD READ IT:
"Section 8 (d) (3) of the Amended Labor Act in the House bill provided that nothing in the Act was to be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with it matters of mutual interest * * *. This provision is omitted from the conference agreement since the act by its terms permits individual employees and	"Section 8 (d) (3) of the Amended Labor Act in the House bill provided that nothing in the Act was to be construed as prohibiting an employer from forming or maintaining a committee of employees and discussing with it matters of mutual interest * * *. This provision is omitted from the conference agreement since the act by its terms permits individual employees and

[36] *Cf.* Petition, pp. 19-20, 32; R. 107.
[37] R. 133-137, 139; and see Tr., generally.

groups of employees to meet with the employer and Section 9 (a) of the conference agreement permits employers to answer their grievances."

groups of employees *(but not employee committees formed or maintained by an employer)* to meet with the employer and Section 9 (a) of the conference agreement permits employers to answer their grievances *(but not grievances presented by such employee committees)*."

Petitioner's assertions are not materially aided by the subsequent statements in the debate in the Senate as detailed in the petition. The statement of Senator Taft[39] was textually accurate; **no provision relating to company dominated unions was changed** by the amended act, the change dealt with committees which were not considered to be unions of any kind. The same is true of the pronouncements of Senator Ball.[40] But be that as it may, if the language of the debate be deemed sufficiently ambiguous to encompass a disclaimer of any intent to permit employee committees to be maintained, such language still could not detract from the clear intention demonstrated by the Conference Report, which, as above shown, is controlling.

The ultimate effect of petitioner's contention is that an employer would be barred by the Act from discussing with groups of its employees grievances and other matters pertaining to the employment, except with the intervention of a bargaining agent. To illustrate: *N.L.R.B. v. Kennametal, Inc.*,[41] held a completely unorganized group presenting a spontaneous grievance to be a "labor organization". *N.L.R.B. v. Stow Mfg. Co.*[42] (here relied on by

[38] Petition, p. 13.
[39] See Petition, p. 12; and *cf.* 2 Leg. Hist. 1539.
[40] See Petition, p. 13; and *cf.* 2 Leg. Hist. 1103.
[41] 182 F. (2d) 817 (C.A. 3).

the Board) held to be "labor organizations" monthly meetings of **all** employees at which grievances and other matters pertaining to employment were presented to the employer. And now, here,[43] the Board would have it that any committee which discusses grievances, etc., with the employer is a labor organization. Thus, says the Board, a meeting with **all** employees is a labor organization, a meeting with a select few (committee) is a labor organization, or a meeting with a disorganized group of employees is a labor organization, if such meeting discusses anything bearing on the employment relationship. And if the employer calls or "maintains" such a meeting, or series of meetings, he is "interfering" with or "dominating" or "supporting" a labor organization.

Therefore, the net result of the Board's position is to deny to an employer the right to call a meeting of all or part of his employees and discuss with them any matters pertaining to their jobs, whether or not any bargaining is intended or occurs and whether or not a bargaining representative exists. Such a result would deny to an employer (and to his employees) freedom of speech and freedom of peaceable assembly in violation of the First Amendment to the Constitution of the United States. The prohibition against discussing matters dealing with employees' jobs is an effective prohibition against all speech[44] with employees in groups, except where bargaining agents are involved. But, as above shown, no matter what the intent of the original Act, the amendments make it clear that no such untenable restriction was envisaged, and that the right of an employer to "discuss" any subject with groups or committees of his employees, even grievances, is not restricted.

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[42] 217 F. (2d) 900 (C.A. 2), cert. den. 348 U.S. 964.
[43] Petition, pp. 10-14.
[44] *Cf. Thomas v. Collins*, 323 U.S. 516, 530, 535.

CONCLUSION

Even under the original Act it was not the intention (as the petition appears to suggest) that every employee committee formed by management be outlawed; otherwise, there need not have been added the qualification that the committee "exist for the purpose * * * of dealing with" the employer. However, the Board, in its zeal to stamp out "company unions" went far beyond the legislative intent, and the Courts, relying upon the Board's assumed expertise, followed suit. The practical result was to outlaw **all** employee committee plans. Congress undertook to remedy this unsatisfactory situation in the 1947 Amendments. Under the Act, as amended, an employer may legally maintain a committee of his employees with whom he may "discuss" any subject under the sum, including the adjustment of grievances not handled by a bargaining agent, but he still may not utilize such a committee as a disguised company union by bargaining with it. This is the sum and substance of the decision below.

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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